Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 197

J. C., N. C. and A. C. HADJIPATERAS,
Petitioners,

against

THE AMERICAN TOBACCO COMPANY, *et al.*,
and HELLENIC LINES, LTD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, J. C., N. C. and A. C. Hadjipateras, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 115 F. Supp. 269. The opinion of the Court of Appeals for the Second

Circuit is reported at 211 F. 2d 666. A copy of the opinion of the Court of Appeals and of its judgment are appended hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on April 9, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

The Question Presented

The sole question presented is whether Supreme Court Admiralty Rule 7 applies to a limitation of liability proceeding filed in Admiralty, pursuant to Section 185 of Title 46, U.S.C., in which costs are awarded to the petitioners therein against unsuccessful claimants.

Statutes Involved

The question presented involves the application of Admiralty Rule 7 of this Court, which was promulgated on December 6, 1920, and became effective on March 7, 1921. Rule 7 provides:

> "If costs shall be awarded by the court to either party or any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party."

The statutory authority for this Rule in effect at the time that the costs were taxed in this case is found in 28 U.S.C. 2073, which provides:

> "§2073. Admiralty rules for district courts
> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and

procedure in admiralty and maritime cases in the district courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States.

"Such rules shall not abridge or modify any substantive right.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Statement of the Case

Petitioners were successful in a limitation of liability proceeding in admiralty, instituted by them as owners of the SS. KATINGO HADJIPATERA in the District Court for the Southern District of New York pursuant to Section 185 of Title 46, U.S.C., as to sixteen cargo claimants whose claims amounted to about $800,000, or 96% of the total amount of claims filed, and were awarded costs against those claimants. Petitioners, having given security in the limitation of liability proceeding in the form of an *ad interim* stipulation for value in the sum of $555,750 as required by law, that amount being the value of petitioners' vessel and her pending freight, sought to tax the premium expense incurred and paid thereon amounting to $42,731.75, but the Court of Appeals held that this premium expense could not be taxed as part of the costs awarded against the unsuccessful claimants despite Admiralty Rule 7 of this Court.

The Court of Appeals, in reaching this conclusion, held that even though costs are awarded to successful petitioners in a limitation of liability proceeding, such costs could not include the premium expense incurred by the petitioners on security furnished in the proceeding, upon the theory that such a proceeding is brought for the sole benefit of the vessel owner, and that Supreme Court Admiralty Rule 7 had no effect on the practice prevailing in the Second Circuit before this Rule became effective in 1921.

Reasons for Allowance of the Writ

The question presented involves the application of Admiralty Rule 7 of this Court to a proceeding initiated by vessel owners under Section 185 of Title 46 U.S.C. for exoneration from liability and/or limitation of their liability to the value of their interest in the vessel and her pending freights. Though this Rule provides that if costs are awarded by the Court to any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party, the court below refused to permit the petitioners, to whom costs were awarded against unsuccessful claimants, to tax the premium expense incurred and paid, upon the theory that the proceeding was brought for the sole benefit of the vessel owner and that Rule 7 has no application to such a proceeding. The premiums and other expense of the *ad interim* stipulation for value furnished by the petitioners which was incurred by them amounted to $42,731.75 (App. p. 4),[1] and was necessarily incurred because at the time that the limitation of liability proceeding was instituted

[1] References are to Appendix to Petitioners' Brief in the Court of Appeals.

suits were pending against the vessel and her owners far exceeding her limitation value of $555,750 (App. pp. 3-4) and their vessel had been attached on claims in excess of her value and her pending freight (App. pp. 11-12). There were thirty claimants whose claims totalled $829,275 (App. p. 13). The petitioners were held entitled to limit their liability as to all claimants, and to exoneration as to sixteen claimants (App. p. 10). The claims of those unsuccessful claimants against whom costs were awarded, amounted to about $800,000, or 96% of the total claims filed.

The question presented is of immense importance to vessel owners and bareboat charterers who are required to assert their basic statutory right to limit their liability where numerous claims are asserted against them, the amount of which exceeds the value of their interest in the carrying vessel and her pending freight, and where costs are awarded against unsuccessful claimants.

The Court of Appeals held that regardless of Admiralty Rule 7 of this Court, the premium and other expense incurred by the petitioners were not taxable as part of the court costs awarded against the unsuccessful claimants, and in support of its ruling relied upon its previous decision in the *Martin Marine Transp. Co., Inc.* v. *Jakobson & Peterson, Inc.*, 135 F. 2d 325, in which only one claim was involved. In such a situation, the vessel owner can secure the benefits of the Limited Liability Act by setting it up as a defense to a suit.

However, where there is more than one claim, the total of which exceeds the value of the vessel and her pending freight, as in this case, a limitation of liability proceeding under Section 185 of Title 46 U.S.C. and the Admiralty Rules of this Court is the only way that a vessel owner can bring about a concourse of claims and achieve a limitation of liability. This concourse is not, however, for

the sole benefit of the petitioner, as the Court of Appeals seems to have thought.

It was stated by this Court in *Maryland Casualty Company et al.* v. *Cushing,* 98 L. Ed. (Advance p. 519), decided on April 12, 1954 (after the decision of the Court of Appeals in this case), at page 526:

> "Moreover, it is important to bear in mind that the concursus is not solely for the benefit of the shipowner. The elaborate notice provisions of the Admiralty Rules are designed to protect injured claimants. They ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages."

Furthermore, the Court of Appeals in refusing to apply Rule 7, in accordance with what it had said in the *Martin* case, that this Rule "merely included premiums among taxable disbursements and added nothing to the existing practice in this Circuit", arrived at a result quite inconsistent with what the practice was in the Second Circuit when Rule 7 became effective. When that Rule became effective the practice in the Second Circuit where more claims than one were involved, the total of which exceeded the value of the vessel, and the right to limit was contested, was to tax such premium expense against the unsuccessful claimants. This was the holding in *The Stifender,* 275 F. 271. That case was decided on July 18, 1921, the costs, however, having been taxed prior to the promulgation of Rule 7.

There is an indication that the Court in that case would have cited Rule 7 as confirming that practice and requiring the taxation of such premium expense in its statement at page 279. After observing that Rule 7 had been promulgated, Circuit Judge Rogers said:

> "The above rule was not in force, and had not even been promulgated when the costs were taxed on February 2, 1920, and is not therefore necessarily

> controlling upon the question now under consideration."

Despite the result in *The Stifender,* the Court of Appeals adhered to its decision in the *Martin case* as to the non-affect of Rule 7, even where there are multiple claims far exceeding the limitation value.

The Stifender, which was cited in the *Martin case* but not mentioned in the Court's opinion in the latter case, was summarily disposed of by the Court of Appeals in this case with the statement:

> "We now adhere to that[2] and *The Stifender* should be treated as overruled to the extent it then was *sub silentio.*"

However, regardless of what the practice in the Second Circuit might have been when Rule 7 became effective, or what it may now be, it is obvious that it must bow to Rule 7 if this Court intended that Rule to be applicable to the premium expense in connection with stipulations in limitation of liability proceedings.

This Court's answer to that question is (as already stated) of immense importance to vessel owners.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named thereon, a full and complete transcript of the record and all proceedings of the case entitled on its docket "*The American Tobacco Co. et al.* against *SS. 'KATINGO HADJIPATERA' and J. C., N. C. and A. C. Hadjipateras and Hellenic Lines,*

[2] i.e., the *Martin case.*

Ltd., Docket No. 22970"; and that the said decree of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just, and your petitioners will ever pray.

J. C. HADJIPATERAS,
N. C. HADJIPATERAS,
A. C. HADJIPATERAS,
Petitioners,

By PAUL V. MCNUTT,

Counsel for Petitioners.

APPENDIX
(Opinion)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 210—October Term, 1953.
(Argued March 4, 1954 Decided April 9, 1954.)
Docket No. 22970

THE AMERICAN TOBACCO COMPANY, *et al.*,
Libellants-Appellees,

against

SS. "KATINGO HADJIPATERA" and J. C., N. C. and A. C. HADJIPATERAS,
Petitioners-Appellants,

and

HELLENIC LINES, LTD.,
Respondent-Appellee.

Before:

CHASE, *Chief Judge,*
FRANK and HINCKS, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York overruling exceptions to the taxation of costs. Weinfeld, *Judge.* Affirmed.

BIGHAM, ENGLAR, JONES & HOUSTON, *Proctors for Libellants-Appellees,* Henry N. Longley, John W. R. Zisgen, Advocates.

MCNUTT & NASH, *Proctors for Petitioners-Appellants,* James E. Freehill, of Counsel.

Appendix
(Opinion of U. S. Court of Appeals, Second Circuit)

CHASE, *Chief Judge*:

The sole question now raised is whether the amount of the annual premiums paid by the shipowners on a stipulation for value in a limitation proceeding may be taxed as costs against unsuccessful claimants in the proceeding. They were held not taxable and the shipowners have appealed from that order.

Cargo on the appellants' S.S. Katingo Hadjipatera having been damaged on a voyagle of that ship from Greece to the United States, cargo owners brought seven suits against the ship, which was attached in at least one suit, its owners, and its charterer. By appropriate pleadings issues were joined which included the causes of action alleged in the suits and the right of the shipowners to contributions in general average and the rights of the owners and the charterer in respect to indemnity from the owners should either be held liable to cargo. The owners also filed a petition for exoneration or limitation. There was a consolidated trial which resulted in limitation of the liability as to all cargo claimants[1] and exoneration as to seventeen, the charterer being held primarily, and the shipowners secondarily, liable to the successful claimants. *American Tobacco Co.* v. *The Katingo Hadjipatera,* 81 F. Supp. 438. On appeal this decree was modified to limit exoneration to sixteen claimants and as modified was affirmed. 194 F. 2d 449.

Before the vessel was attached, as above noted, a notice of the requisition, not of the title, but of the possession and use of the vessel by the Greek Government had been received by its captain but it was to become effective only

[1] There were thirty of them.

after the ship had discharged cargo at New York. As no possession of the vessel was taken under the requisition until after it had been attached in the above mentioned suit, a suggestion of sovereign immunity made in behalf of the Greek Government was overruled. *The Katingo Hadjipatera,* 40 F. Supp. 546; aff'd, 119 F. 2d 1022.

What has been outlined shows sufficiently for present purposes the situation of the ship and the parties to the litigation when the shipowners filed their petition for limitation and filed the stipulation for value on which they paid the premiums here involved.

The district judge felt that our decision in *Martin Marine Transportation Co. Inc.* v. *Jakobson & Peterson, Inc.,* 135 F. 2d 325, required the disallowance of these premiums as taxable costs and we agree.

As pointed out in the opinion in that case we followed our previous decision in *The W. A. Sherman,* 167 Fed. 976, to the effect that a petitioner for limitation must bear what expenses he incurs in taking advantage of his right under the law to petition for limitation or exoneration. That is, the cost of initiating such proceedings are for his own account, though costs which are incident to a contest over his right to limitation are taxable in the usual way. *The Wm. E. Gladwish,* 2 Cir., 215 Fed. 900, is to the same effect. The appellant seeks to distinguish the *Martin Marine* case, *supra,* by pointing out that it was a single claim proceeding and that in such a situation a petition for limitation, though permissible, is, as was said in *Algoma Central & Hudson Bay Ry. Co.* v. *Great L. T. Corp.,* 2 Cir., 86 F. 2d 708, 710, but "an alternative to a plea in bar to the claimant's action" while where "there are more claims than one, a concourse is the only way to secure the owner's

immunity, except at the greatest inconvenience and expense, if even these would avail." See also, *The West Point,* E.D. Va. 83 F. Supp. 680.

There is, indeed, this difference between a multiple-claim and a single-claim situation. As a practical matter the choice to defend in multiple-claim situations by means of a petition for exoneration or limitation may be the only sensible one, but so doing is an exercise of the same right in each instance and the same reasons why the starting cost of the proceeding for exoneration or limitation should be borne by the petitioner in the one instance apply to the same effect in the other. In *C. J. Dick Towing Company, et al.* v. *The Leo,* 5 Cir., 202 F. 2d 850, which was a multiple-claim proceeding, it was held, as in the *Martin Marine,* case, that "the expenses of initiating the limitation proceeding must be borne by its petitioner, * * *"

To secure the benefits of the statute the petitioner must comply with the statutory conditions upon the right to bring about a concourse. A basic condition is compliance with §185 of Title 46 U. S. C. to make sure that if liability is limited that to which it is limited by §183 of the same title will be available for allocation among the claimants whose claims are proved. Since in this instance the claims were all for cargo damage, subsection (b) of §183 did not apply and limitation if granted, would fix liability at an over-all amount not in excess of "the amount or value of the interest of such owner in such vessel, and her freight then pending." Section 185 allows a petitioner to make this amount available either by depositing "with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor * * * " By so doing,

of course, the petitioner retains his interest in the ship and pending freight for his own benefit. But if he prefers to relinquish such interest he may transfer it "for the benefit of claimants, to a trustee to be appointed by the court * * * " and thereby relieve himself of the necessity of depositing cash or giving security. If he elects to avoid a surrender and to have the benefit of the retention of his interest in the vessel and freight pending he must pay the price of that by depositing cash or giving security at his own expense.

In *The Stifinder,* 2 Cir., 275 Fed. 271, a distinction was made between a proceeding in which the petitioner's right to limit was contested and those in which the contests have been confined to liability, and the *Sherman* and *Gladish* cases were distinguished on that ground. Although the Stifinder was not mentioned in the opinion in *Martin Marine Transp. Co. Inc.* v. *Jakobson & Peterson, Inc., supra,* on which we now principally rely, it was there expressly held that the initial expenses of the proceeding must be paid by the petitioner, "whether or not the claimant contests his right to limit, and even though the petitioner wins when the claimant has done so." We now adhere to that and *The Stifinder* should be treated as overruled to the extent it then was *sub silentio.*

Moreover what was there said as to the non-effect of Admiralty Rule 7, 28 U. S. C. §723 and of the 1936 amendment to §185 of Title 46, U. S. C. upon the result applies equally here.

Order affirmed.

APPENDIX
(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of April, one thousand nine hundred and fifty-four.

Present:

HON. HARRIE B. CHASE,
Chief Judge,

Hon. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges.

AMERICAN TOBACCO CO., *et al.*,
Libellants-Appellees,

v.

S.S. KATINGO HADJIPATERA & J. C., N. C. & A. S. HADJIPATERAS & HELLENIC LINES LTD.,
Respondents-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and decree of said District Court be and they hereby are affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

FILED
JUL 30 1954
HAROLD B. WILLEY, Clerk

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—against—

THE AMERICAN TOBACCO COMPANY, *et al.*,
and HELLENIC LINES, LTD.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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THE AMERICAN TOBACCO COMPANY, *et al.*,
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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This is the third petition for a writ of certiorari which has been filed in this case. The first and second petitions were denied (313 U. S. 593; 343 U. S. 978-9); the present petition relates solely to the taxation of costs.

Petitioners present for the consideration of this Court the sole question whether Rule 7 of the Rules of Practice in Admiralty, promulgated by this Court December 6, 1920 (254 U. S. 679*ff.*), required the District Court to tax against the unsuccessful claimants in a proceeding in admiralty for limitation of liability, the expense incurred by petitioners in furnishing an *ad interim* stipulation for value.

Rule 51 in Admiralty (254 U. S. 703, 704) required petitioners to pay into Court the value of their interest in the vessel and freight, or to transfer their

interest to a trustee, or to furnish a stipulation for the value of their interest. Petitioners elected the third alternative.

Both Courts below held that Rule 7 does not require taxation of the cost of furnishing the stipulation (115 F. Supp. 269; 211 F. (2d) 666).

Preliminarily, it should be noted that this Court has long held that the matter of costs *per se* is not the proper subject of an appeal:

U. S. v. *Brig Melik Adhel,* 2 How. 210, 237.

Costs in admiralty, as in equity, are in the discretion of the Court, and appeals relating to them are usually entertained only when the entire case is before the Court:

The Scotland, 118 U. S. 507, 519.

This Court has heretofore refused to consider this case on the merits (343 U. S. 978-9).

Furthermore, the decisions below were right. Under the rules in effect prior to 1921 (most of them promulgated in 1845—3 How. ix) there was no provision for the taxation of premiums on stipulations, probably because such stipulations were seldom furnished by surety companies. As the use of surety company stipulations grew, the question arose of the taxability of the premiums which they charged; and the practice in the several circuits on this question was not uniform. Thus, the First Circuit (*The Governor Ames,* 187 Fed. 40, 48); the Third Circuit (*The Texas,* 226 Fed. 897, 905); and the Fifth Circuit (*Parkerson*

v. *Borst,* 256 Fed. 827) held that premiums on stipulations for value given to release vessels from attachment were not taxable, because their taxation was not authorized by any statute, rule or usage; while the Ninth Circuit (*The Europe,* 190 Fed. 475, 481) held that such premiums were taxable. The District Courts in the Second Circuit likewise held them taxable (*The Hurstdale,* 171 Fed. 607; *The John D. Dailey,* 158 Fed. 642), and the Circuit Court of Appeals apparently approved their allowance in principle (*The Volund,* 181 Fed. 643, 667).

With the increase in American shipping during World War I, uniformity among the circuits on this question became desirable; and in 1920 this Court promulgated Rule 7. The rule provided the basis for taxation of premiums on stipulations given to release vessels from attachment, the lack of which had theretofore influenced the First, Third and Fifth Circuits to decline to tax premiums on such stipulations in the cases cited.

Even in the Second and Ninth Circuits, however (which had theretofore permitted taxation of premiums on stipulations to release vessels from attachment) petitioners for limitation of liability had never been permitted to tax premiums on their stipulations for value in limitation proceedings:

The William E. Gladwish, 215 Fed. 900 (2 C. C. A.);

The W. A. Sherman, 167 Fed. 976, 977 (2 C. C. A.);

Boston Marine Ins. Co. v. *Metropolitan Redwood Lumber Co.,* 197 Fed. 703, 714 (9 C. C. A.).

In the light of these decisions, the language employed by Judge Learned Hand in *Martin Marine Transp. Co. Inc.* v. *Jakobson & Peterson, Inc.,* 135 F. (2d) 325, in holding that premiums on *ad interim* stipulations were not taxable after Rule 7 was promulgated, becomes clear. Speaking for the Court in that case, he said (p. 329):

> "We cannot see that Admiralty Rule 7, 28 U. S. C. 723, * * * makes any difference. The Rule * * * added nothing to the existing practice in this circuit; * * *."

Rule 7 added nothing to the practice in the Second Circuit because, as the decisions cited above make clear, the Rule applies only to premiums on stipulations to release vessels from attachment, which were already taxable in the Second Circuit, as they were in the Ninth. Premiums on *ad interim* stipulations for value filed in limitation proceedings, on the other hand, were not taxable in either Circuit; and the Ninth Circuit, like the Second, held that Rule 7 did not make them so:

> *The Walter A. Luckenbach,* 14 F. (2d) 100, 104.

The Fifth Circuit, which prior to the promulgation of Rule 7 had declined to permit taxation of premiums on any stipulations, does not interpret that Rule as permitting taxation of premiums on stipulations for value in limitation proceedings:

> *C. J. Dick Towing Co.* v. *The Leo,* 202 F. (2d) 850, 856.

nor does the District Court for the Eastern District of Pennsylvania, in the Third Circuit:

> *The Montrose,* 1945 A. M. C. 454, 456-7.

The Stifinder, 275 Fed. 271 (2 C. C. A.), relied on by petitioners, far from establishing the practice of the Second Circuit, as petitioners contend, stands alone. It has been twice overruled by the Court which rendered it (Petition, p. 13); and in any event it expressly refrains from passing upon the point which petitioners seek to have this Court consider (Petition, pp. 6-7).

So far as we can find, in the thirty-three years since Rule 7 was promulgated, no Court has ever held that it authorized taxation against the unsuccessful claimants in a limitation proceeding of the premium on a stipulation for value which a petitioner elected to file in lieu of surrendering his interest in vessel and freight to a trustee or paying the value thereof into Court. The Courts of Appeal in three circuits (Second, Fifth and Ninth), and a District Court in another (Third), have held that it did not.

Finally, the sole question posed by the petition seems hardly within the compass of Rule 19 of the Rules of this Court (347 U. S.).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN W. R. ZISGEN,
Counsel for Respondents,
The American Tobacco Co., et al.

HENRY N. LONGLEY,
Of Counsel.